No. 76-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF NEW HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1976

No. 76-453

STATE OF NEW HAMPSHIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a State and admittedly an "employer" subject to the terms and conditions of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* (Pet. 3-4), seeks review of a court of appeals decision sustaining the validity of Equal Employment Opportunity Commission (EEOC) regulations that require the filing of reports identifying employees by race, national origin, and sex. In our view, the court of appeals correctly held under well-established principles that the EEOC regulations on employee race/ethnic identification are both authorized by Title VII and constitutional. There is no reason for further review by this Court.

1. The United States brought suit against petitioner for its noncompliance with Section 709(c) of Title VII, as amended, 42 U.S.C. (Supp. V) 2000e-8(c), and regula-

tions promulgated pursuant thereto (29 C.F.R. Part 1602) by reason of its failure to file acceptable reports[1] for calendar year 1973 and its refusal to file any such reports for calendar year 1974. The district court entered summary judgment for the United States (Pet. 5), and the court of appeals affirmed (Pet. App. 19-25). Petitioner admits each of the factual allegations of the complaint but asserts that the regulations requiring the reporting of certain "race/ethnic group identifications" are not authorized by Section 709(c) of Title VII, or, if so, are unconstitutional (Pet. 4-5; Pet. App. 20).

In a thorough opinion upon which we rely, the court of appeals held that the Act's record keeping and reporting requirement is a "reasonable and proper means of assuring equality in employment" (Pet. App. 24-25) and that the implementing regulations "represent a reasonable administrative effort 'to fill up the details' which Title VII implied but did not specify" (Pet. App. 21). Such regulations have the force and effect of law "unless unreasonable and plainly inconsistent" with the underlying statute. *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501; *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349. See *United States* v. *Grimaud*, 220 U.S. 506, 517. As the court of appeals found, the information sought by the regulations is "essentially raw statistical data" (Pet. App. 21) which is useful in the process of determining whether or not illegal discrimination is present in a particular factual situation. *State of Alabama* v. *United States*, 304 F. 2d 583, 586 (C.A. 5), affirmed, 371 U.S. 37. See *United States* v. *Ironworkers Local 86*, 443 F. 2d 544, 551 (C.A. 9),

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[1]The EEOC found unacceptable a report filed by the State in which the only designation used as to the ethnic category of all its employees was "American" (Pet. 4; Pet. App. 20, n. 2).

certiorari denied, 404 U.S. 984; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (C.A. 8); *Local 189, United Papermakers and Paperworkers*, AFL-CIO v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919.[2]

The court of appeals also correctly held (Pet. App. 23-24) that Section 709(c) constitutes appropriate legislation to implement Section 1 of the Fourteenth Amendment as to state and local government employees. See *Fitzpatrick* v. *Bitzer*, No. 75-251, decided June 28, 1976, slip op. 2, 6-7. See also *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 721; *Shelley* v. *Kraemer*, 334 U.S. 1, 14-18, 22; 118 Cong. Rec. 1839-1840 (1972). Accordingly, since the implementing regulations here challenged are reasonable and proper under Section 709(c) (see Pet. App. 22), they are similarly authorized by Section 5 of the Fourteenth Amendment. See *Fitzpatrick* v. *Bitzer*, *supra*, slip op. 6-10; *Katzenbach* v. *Morgan*, 384 U.S. 641, 648-651; *Ex parte Virginia*, 100 U.S. 339, 345-346.

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[2]See also *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017, 1027-1028 (C.A. 1), certiorari denied, 421 U.S. 910; *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (C.A. 10), certiorari denied, 401 U.S. 954. Such statistical data may likewise properly be used by EEOC pursuant to its congressional authorization to prepare technical studies in order to effectuate the purposes of Title VII. Section 706(g)(5), 42 U.S.C. (Supp. V) 2000e-4(g)(5). See Pet. App. 21, n. 3. Any possible misuse of such statistical data is purely hypothetical and subject to subsequent judicial scrutiny (Pet. App. 22-23).

The petition for a writ of certiorari should be denied.

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